No. 20,872

IN THE

United States Court of Appeals

For the Ninth Circuit

ARISTA CIA. DEVAPORES, S.A.,
Appellant,
vs.
HOWARD TERMINAL,
Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

In its brief, Appellee reviews a number of cases as having been cited by Appellant for the proposition "that the stevedore had breached its warranty of workmanlike service where there was no liability on the part of the vessel and where the sole proximate cause of the longshoreman's injury was his own negligence." A reference to Appellant's brief shows that, of the eight cases referred to by Appellee, only three, *Damanti*[1], *Guarracino*[2] and *Massa*[3], were cited by us for the entire proposition

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[1] *Damanti v. A/S Inger,* 314 F.2d 395, 1963 A.M.C. 852 (2d Cir.).

[2] *Guarracino v. Luckenbach Steamship Company,* 333 F.2d 646, 1964 A.M.C. 2240 (2d Cir.).

[3] *Massa v. C. A. Venezuelan Navigacion,* 332 F.2d 779, 1964 A.M.C. 1375 (2d Cir.).

quoted above. The remainder of the cases reviewed by Appellee were cited for narrower propositions such as the proposition that the injured man's negligence could be the sole basis of indemnity where the vessel had been held liable for unseaworthiness. We believe that a review of Appellant's brief will show that every case cited by Appellant supports the proposition for which it is cited.

The *Damanti, Guarracino* and *Massa* cases are all good authority for the proposition that indemnity is due for the expenses of a successful defense where the injury was caused solely by the negligence of the injured man.

Appellee disparages *Damanti* by quoting language from the opinion indicating that there was evidence of possible unseaworthiness. The *Damanti* case concerned only the indemnity claim (the injured man's claim having been settled) and the trier of fact found that there was no unseaworthiness of the vessel nor negligence of her owner and that the injury was caused solely by stevedore negligence, evidently in respect of the actions of the injured longshoreman alone. The reference of the Court of Appeals to evidence of unseaworthiness was not a finding to that effect but concerned only the reasonableness of the conduct of the shipowner in settling the injured longshoreman's claim. *Damanti* stands unqualifiedly for the shipowner's position in the present case.

In *Guarracino* and *Massa* two grounds existed for indemnity, the negligence of the injured man himself and the concurrent negligence of a co-employee. The Court, in each case, gave these bases of stevedore liability equal dignity and made it explicitly clear that the negligence of

the injured man himself was adequate to impose indemnity.

The stevedore makes an argument that it should not be held because the longshoreman's negligence in causing injury to himself is not a tort. It is difficult to understand this, as liability is not sought to be imposed on a tort basis but rather upon the conventional contract basis that the stevedore has not performed safely and properly and in a workmanlike manner. Whether negligence that injures only the negligent person is a tort does not seem like a fruitful inquiry. What does seem clear is that negligence is not safe, proper and workmanlike performance, whether it injures the negligent man, another man or both simultaneously.

Appellee asserts that the *Drewery* case[4] "has squarely decided the issue at bar". The *Drewery* case was difficult to follow, since the Court's decision appeared to be based upon some hesitancy in embracing the truism that the doctrine of *respondeat superior* applies not only to vessel owners but to stevedores or other maritime contractors in the performance of their contracts. However that may be, the *Drewery* court, in *Lusich v. Bloomfield Steamship Company,* 355 F.2d 770, 1966 A.M.C. 191 (5th Cir.), has restricted *Drewery* to the contract involved in the particular case and rejected its application to cases like the present one.

The stevedore argues against indemnity by analogy to a hypothetical claim which could be successfully defended

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[4] *Drewery v. Daspit Bros. Marine Divers, Inc.,* 317 F.2d 425, 1963 A.M.C. 1787 (5th Cir.).

on different grounds than here. There are a number of bases on which claims may be successfully defended besides establishing that the vessel was not unseaworthy. For example, a suit by a longshoreman on account of injuries caused by stevedore carelessness, whether or not a condition of unseaworthiness is created in the process, may be dismissed after lengthy proceedings because it is barred by the statute of limitations or by failure to prosecute. Surely the stevedore should not escape liability for the shipowner's expenses simply because the shipowner has been able to defeat liability on a technical ground of that sort. To be sure, if the longshoreman's claim is defeated because there has simply been no negligence or other breach of duty on the part of anyone, the stevedore is not liable. But this is not such a case, any more than it is a case of no injury at all. This is in fact a case in which the stevedore's performance was not safe and proper and an injury occurred as a result. Indemnity should not depend upon the fortuitous technicality that the stevedore's negligence, in the process of injury, creates a condition which may be found to constitute unseaworthiness.

Dated, San Francisco, California,
November 1, 1966.

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